SUPREME COURT, U.S.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

No. 74-147

OCTOBER TERM, 1974

AAACON AUTO TRANSPORT, INC., Petitioner,

v.

HONORABLE MORRIS E. LASKER, Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AAACON AUTO TRANSPORT, INC., *Petitioner.*

v.

HONORABLE MORRIS E. LASKER, *Respondent.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Aaacon Auto Transport, Inc., petitioners this Court for a Writ of Certiorari, to review the order of the United States Court of Appeals for the Second Circuit denying their petition for a Writ of Mandamus.

## OPINIONS BELOW

In the case below, petitioner petitioned the United States District Court for the Southern District of New York for an order directing arbitration pursuant to 9 U.S.C. Section 4. The decision of the District Court, per Lasker, J., not

reported, denying petitioner's petition and holding said petition in abeyance, is set forth in Appendix No. 1. The endorsement of Judge Lasker denying petitioner's motion to reargue is set forth in Appendix No. 2. The letter of Judge Lasker, deferring action on respondent's motion to dismiss the petition is set forth in Appendix No. 3.

Petitioner thereafter filed a petition for a writ of mandamus in the United States Court of Appeals for the Second Circuit. The Order, without opinion, denying this petition is set forth in Appendix No. 4. The Orders, without opinion, denying petitioner's timely petition for reconsideration en banc are set forth in Appendix No. 5.

## JURISDICTION

The Order of the Court of Appeals denying petitioner's timely petition for reconsideration of the Order denying petitioner's writ of mandamus was entered on July 1, 1974. Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in denying the petition for a writ of mandamus directing the Honorable Morris E. Lasker to decide the case of *Aaacon Auto Transport, Inc. v. J. Wayland Thomas and Cora G. Thomas*, Civ. Action No. 71-3917;

2. Whether the judicial doctrine of primary jurisdiction can be invoked in a case involving the Federal Arbitration Act, where the doctrine appears to conflict with the judicial procedures mandated by Congress in 9 U.S.C. Section 4. This is a novel question of the first impression, and should be resolved by this Court;

3. Whether the invocation of the doctrine of primary jurisdiction violates due process of law, by denying petitioner's substantial rights granted by statute in 9 U.S.C. Section 4.

4. Whether the doctrine of primary jurisdiction can be invoked when the courts by previous decisions have already determined the issue to be referred.

## STATUTES AND FEDERAL RULES INVOLVED

**United States Code, Title 9, Section 4**

*§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such

agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

**Federal Rules of Civil Procedure, Rule 81(a)(3)**

(*a*) *To What Proceedings Applicable.*

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, §9 (44 Stat. 585), U.S.C., Title 45, §159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or

agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

## STATEMENT OF THE CASE

There is now pending in the United States District Court for the Southern District of New York Civil Action No. 71-3917-MEL, entitled In The Matter Of The Arbitration Of Certain Differences Between AAACON AUTO TRANSPORT, INC., Petitioner and J. WAYLAND THOMAS and CORA G. THOMAS, Respondents.

Petitioner Aaacon Auto Transport Inc., (hereinafter "Aaacon") is a licensed motor carrier operating in interstate commerce throughout the continental United States. In February, 1971, J. W. Thomas and Aaacon entered into a written Bill of Lading Agreement to transport a vehicle belonging to the Thomases in interstate commerce. That agreement provided, inter alia, for the aribitration in New York City of any dispute arising between the parties. The pertinent part of the Bill of Lading Agreement reads:

> "Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof, . . . shall be settled by arbitration in the City, County, and State of New York, . . ."

Thereafter, a dispute did arise concerning alleged damage to the vehicle during shipment. On August 31, 1971, Aaacon sought a determination of this dispute by arbitration and filed a petition to compel arbitration

pursuant to 9 U.S.C. Section 4 in the Federal District Court for the Southern District of New York.

The petition to compel arbitration was opposed by the real party in interest, Continental Insurance Co., in the name of the Thomases, on the primary ground that the arbitration provision in the agreement between the parties was in conflict with 49 U.S.C. 20(11).

The District Court, per Lasker, J., expressly found that "subject matter jurisdiction of the petition is vested in this Court . . . by 28 U.S.C. Section 1337 . . . accordingly this Court also has jurisdiction under 9 U.S.C. Section 4." However, Judge Lasker denied Aaacon's motion to compel arbitration and invoked the doctrine of primary jurisdiction, holding the petition in abeyance pending the outcome of an administrative proceeding in which Aaacon and the Interstate Commerce Commission were engaged, and in which, it was alleged, the validity of the arbitration provision in light of 49 U.S.C. Section 20(11) would be considered.

Subsequently Judge Lasker was incorrectly advised by respondents that an interim decision of a hearing examiner was a final decision of the Interstate Commerce Commission, and refused to reconsider the denial of Aaacon's motion to compel arbitration. He further suggested that respondents file a motion to dismiss the petition, which they did on December 18, 1973. However, on March 14, 1974, the Court noted its previous error, and held that it would also defer the action on respondents' motion to dismiss until the Interstate Commerce Commission had actually rendered a final decision.

The net effect of Judge Lasker's decision denying Aaacon's motion to compel arbitration and respondents'

motion to dismiss was to leave the case in abeyance and both parties in limbo pending a final decision of the Commission.[1]

Aaacon sought to review Judge Lasker's decision invoking the doctrine of primary jurisdiction, and staying the proceedings below, by petitioning the United States Court of Appeals for the Second Circuit for a writ of mandamus on April 30, 1974. This was denied on May 3, 1974. A timely petition for reconsideration en banc was subsequently made on May 16, 1974 and denied on July 1, 1974.

This case presents for review the refusal of the District

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[1] In this regard, Aaacon notes that the Commission had, by order of March 1971, commenced a proceeding involving Aaacon. Two and a half years thereafter, on November 30, 1973, the hearing examiner served an interim decision. This decision did not consider any of the evidence submitted by Aaacon which consisted of over 1,100 pages of testimony and over 150 exhibits which are now to be considered in full for the first time by the Interstate Commerce Commission. The interim decision did not cite any authority for its discussion of arbitration nor did it consider the prior Federal case law involving Aaacon and other carriers with regard thereto, although such authorities were present.

Additionally, Aaacon has requested from the Commission an opportunity to provide additional and new evidence in that proceeding which the Commission by Division 1 has indicated will be considered "after the entry of the initial decision (of the hearing examiner) in this matter". In light of the fact that the Commission proceedings have been in progress for over three years, that additional hearings are contemplated, and that a review of the entire record consisting of over 300 exhibits as well as over 2,000 pages of testimony will be had, it is not unlikely that a long period of time may elapse before a final determination is made by the Commission.

Moreover, nowhere in the original order of March 1971, or in any subsequent disclosure from the Commission, was it indicated that the question of arbitration was to be considered in this proceeding. Accordingly, it is doubtful whether the issue of arbitration is even properly before the Commission under the notice provisions of the Administrative Procedure Act, Section 558.

Court below to decide the issue before it, and the denial by the United States Court of Appeals for the Second Circuit of a writ of mandamus to compel the District Court to decide the issue, as required by 9 U.S.C. Section 4.

## REASONS FOR GRANTING WRIT

### I

### THE DOCTRINE OF PRIMARY JURISDICTION IS IN OPEN CONFLICT WITH THE JUDICIAL PROCEDURES MANDATED BY CONGRESS IN THE FEDERAL ARBITRATION ACT.

Aaacon sought a review of Judge Lasker's decision below since it believes that the invokation of the doctrine of primary jurisdiction violates the provisions of 9 U.S.C. Section 4.

That section, in relevant part, authorizes the District Courts to direct parties to arbitrate after reviewing the agreement in question:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Congress has further mandated in Section 4 that the District courts shall proceed summarily to a trial of any

dispute concerning the validity of the arbitration agreement:

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be an issue, the court shall proceed summarily to the trial thereof."

Congress alone has the power to prescribe the rules of procedure in the District courts. *Livingston v. Storey*, 34 U.S. 632 (1835); *Locherty v. Philips*, 319 U.S. 182 (1942). Aaacon contends they have done so in the Federal Arbitration Act. In this regard, the Federal Rules of Civil Procedure are specifically superseded by the procedures set forth in 9 U.S.C. Section 4. Rule 81(a)(3) of the Federal Rules of Civil Procedure states:

> "In proceedings under Title 9 U.S.C. relating to arbitration, — these rules apply only to the extent that matters of procedure are not provided for in those statutes."

Thus, it is clear from the quoted language of 9 U.S.C. Section 4 that Congress has mandated that the Federal District Courts shall "proceed summarily" to a trial if there is any issue concerning the validity or the making of the agreement, as there is in the instant case.

Accordingly, the doctrine of primary jurisdiction—which is a procedure which contemplates a delay and suspension of judicial determination pending the advice of an administrative agency—violates the procedure mandated in 9 U.S.C. Section 4.

A review of the legislative history of the Federal

Arbitration Act, as well as its explicit language, demonstrate that the purpose of the Act was to make valid and enforceable agreements to arbitrate and to provide a summary trial if the making of an arbitration agreement was in issue.

Thus, in the House Report accompanying HR 646, the Federal Arbitration Act, *Report No. 96, 68th Congress, First Session*, Mr. Graham stated:

> "The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement . . . There is provided a method for the summary trial of any claim that no arbitration agreement was ever made, . . . . At the same time the party willing to perform this contract for arbitration is not subject to the delay and the costs of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court."

It is, therefore, clear that not only the explicit language of 9 U.S.C. Section 4, but the legislative history of the Act as well, demonstrate a policy at odds with the delays and postponements inherent in the doctrine of primary jurisdiction.

Aaacon knows of no instance where the doctrine of primary jurisdiction has ever been invoked in a case involving the Federal Arbitration Act, 9 U.S.C. Section 4. Further, research has uncovered no case in which the doctrine of primary jurisdiction has been applied in the presence of statutory language directing the Court to

proceed summarily to a trial of an issue.

Aaacon believes that the issue herein is truly novel,and is a case of first impression calling for review by this Court.

The case at bar is readily distinguishable from *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959) cited by Judge Lasker below. That landmark case, which enunciated the present posture of the judicial doctrine of primary jurisdiction, did not concern itself with the impact of that doctrine on a Federal statute which mandates an entirely different procedure.

Aaacon respectfully suggests that *River Terminals* is not determinative of the issue at bar in the instant case, which is the inherent conflict between the judicial doctrine of primary jurisdiction and the Congressional mandate for a summary trial enunciated in 9 U.S.C. Section 4.

The closest analogous case that Aaacon has been able to uncover is *Mercury Motor Express, Inc. v. Brinke*, 475 F2d 1086 (5th Cir. 1973). There, the Court of Appeals for the Fifth Circuit held that the doctrine of primary jurisdiction could not be applied to a suit under 49 U.S.C. Section 1017(b)(2). Although the case was decided on several grounds, the Court looked to the legislative intention to provide for a speedy court trial of suits under that section. Unlike the instant case where the statute, 9 U.S.C. Section 4, is explicit on its face, the Court in the *Mercury* case was required to review the legislative history to find the statutory intent. The Court said at p. 1094:

> "An analysis of the purposes of the 1965 amendment which became the present Section

> 1017(b)(2) further confirms the inappropriateness of applying the primary jurisdiction doctrine in this type of litigation. A major purpose was to hasten enforcement procedures in cases of clear violations . . . Commenting on the 1965 amendment, Congressman Oren Harris, Chairman of the Committee, made clear the congressional intent to avoid delay in the procedure created and to provide a relatively speedy remedy:
>
> ' . . . We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues.' 111 Cong. Rec. 9679
>
> "Judicial application of the primary jurisdiction doctrine would re-route plaintiffs through administrative proceedings the amendment entitles them to avoid and permit a delay of precisely the type that Congress sought to eliminate in cases of clear violations."

In the *Mercury Motor* case the Court held that the doctrine of primary jurisdiction could not be applied since it would necessitate a delay which Congress intended to avoid in 49 U.S.C. Section 1017(b)(2). The instant case is even stronger since the express language of 9 U.S.C. Section 4 shows the legislative intent to avoid delay, even more clearly.

Judicial doctrines, no matter how helpful to the courts generally, cannot be invoked in the face of Congressional directives to the contrary. In an analogous situation, the Court of Appeals for the Second Circuit has recently held that another judicial doctrine—that of forum non

conveniens—could not be invoked in a case involving 9 U.S.C. Section 4, because the clear language of the statute, precluded the application of that doctrine. *Aaacon Auto Transport, Inc. v. Ninfo,* 490 F2d 83 (2d Cir. 1974).

Similarly, the clear language of that Section, in providing for a summary trial, likewise precludes the application of the judicial doctrine of primary jurisdiction, with its attendant delays.

Another decision which bears on this issue is *California v. Federal Power Commission,* 369 U.S. 482, 487-90 (1962). There, this Court considered a case involving the right of the Federal Power Commission to make a determination under the antitrust law where one of the parties had sought a determination in the courts. This Court held that the doctrine of primary jurisdiction has a reverse corollary—the courts may not await administrative advice where Congress had specified the courts should make the decision:

> "It is not for us to say that the complementary legislative policies reflected in Section 7 of the Clayton Act on the one hand and in Section 7 of the Natural Gas Act on the other should be better accommodated. Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R.R. v. Abilene Oil Co.*, 204 U.S. 426. The converse should also be true, lest the anti-trust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission."

The foregoing reasoning is directly applicable to the instant case. In 9 U.S.C. Section 4, Congress has directed the District courts to make determinations concerning the validity of arbitration agreements; this policy, mandated to the courts, should not be frustrated by a reference to an administrative agency. And the policy favoring arbitration, whose enforcement Congress has entrusted to the courts, should not be "taken over" by the Interstate Commerce Commission.

## II

## INVOCATION OF THE DOCTRINE OF PRIMARY JURISDICTION IN THE INSTANT CASE AND IN SIMILAR CASES CONSTITUTES A DENIAL OF DUE PROCESS OF LAW

The right granted in 9 U.S.C. Section 4 to a speedy trial on the issue of the making or validity of an arbitration agreement is an important substantive right created under the Federal Arbitration Act. In *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F2d 402 (2d Cir. 1959) the United States Court of Appeals for the Second Circuit, after stating at page 407 "To be sure much of the Act is purely procedural in character . . . ", further held that the Act also created substantive legal rights. The Court at page 409 stated:

> "we, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable and enforceable' created national substantive law . . . and that the rights thus created are to be adjudicated by the Federal courts whenever such courts have subject matter jurisdiction, . . . . We

> hold that the body of law thus created is substantive, not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce . . . "

This substantial rights of petitioner to a speedy trial has been completely obliterated by Judge Lasker's refusal to decide the issue, his stay of the proceedings and his preliminary referral to the Interstate Commerce Commission, with its attendant delays and suspension of judicial determination.

Whereas a referral to an administrative agency normally does not involve the deprivation of any rights to litigants, in cases under 9 U.S.C. Section 4 the issue is more complex. Here the stay and referral also eradicates the parties' statutory right to a speedy trial.

This ruling constitutes a denial of due process because the Congressional mandate for a speedy trial, once violated, cannot be resuscitated.

Furthermore, there is no right of appeal from the denial of a speedy trial provided for in 9 U.S.C. Section 4. The order staying the procedure below, pending the administrative referral, is a non-appealable interlocutory order. *Aaacon Auto Transport, Inc. v. Ninfo*, 490 F2d 83 (2d Cir. 1974).

And, no appeal will lie at any subsequent time from any final order in the case at bar, since once the matter has been stayed, and the referral to the administrative agency has occurred, and the Court has obtained advice from said

agency and issued a final order, any right of appeal, regarding the issue of delay, is rendered moot.

Thus, there is, in effect, no appeal at any time from Judge Lasker's invocation of the doctrine of primary jurisdiction or from his refusal to "proceed summarily to a trial" as required by statute.

Another reason why a referral to an administrative agency is improper and may constitute a denial of due process, is that 9 U.S.C. Section 4 provides for a jury trial on the issue of the making of an arbitration agreement. The statute clearly states that in those cases where a jury has been demanded that the jury shall decide the making of an arbitration provision. Clearly, it would violate due process of law for the court to deny a jury trial of the issue where permitted by statute and replace it, sua sponte, with an administrative referral.

Likewise, if a jury trial has not been demanded, it does not lessen the obligation of the court, sitting without jury, to hold a trial of this issue. 9 U.S.C. Section 4 states: "If no jury trial be demanded . . . the court shall hear and determine such issue". This language, taken in conjunction with the other language of this section stating: "If the making of an arbitration agreement . . . be in issue, the court shall proceed summarily to a trial thereof", shows clearly that an immediate trial shall be had, with or without jury, and that a referral to an agency violates the statute in either case.

## III

## THE DECISION BELOW RAISES SIGNIFICANT AND RECURRENT PROBLEMS WITH RESPECT TO THE FEDERAL ARBITRATION ACT.

The Court below has decided an extremely important question of Federal law which has not been, but should be, settled by this Court. Does the statutory language and legislative intent of 9 U.S.C. Section 4 preclude a Court's invoking the doctrine of primary jurisdiction?

Furthermore, the issue is of extreme importance in the administration of the Federal Arbitration Act. If petitioner is correct, the doctrine of primary jurisdiction, if invoked, will always conflict with the Congressional mandate in 9 U.S.C. Section 4, as well as many other statutes, requiring a trial of a summary nature. To permit the application of the doctrine in such cases threatens the rights of all litigants to speedy trials where required by statute.

As indicated earlier, petitioner knows of no instance where the doctrine of primary jurisdiction has ever been invoked in relation to 9 U.S.C. Section 4. Thus, Judge Lasker's decision below appears to be the first instance where this has been attempted.

Petitioner respectfully submits that the court of first resort should not be the court of last resort on a question regarding substantial rights granted under a Federal statute.

Petitioner further believes that the denial of its petition for a writ of mandamus by the Court of Appeals was a

serious error since it leaves in effect a novel and important holding of the lower court without review, in an area of broad and recurrent application; a holding which is in apparent conflict with the Congressional mandate in 9 U.S.C. Section 4 that "the court proceed summarily to a trial".

Judge Lasker's decision renders ineffective this statutory mandate of a summary trial and opens a Pandora's box regarding the procedure to be followed under 9 U.S.C. Section 4 or similar statutes. Henceforth in any case involving interstate commerce, any litigant or any court, may defeat the very purpose of the Federal Arbitration Act by attacking the arbitration clause in question and obtaining, via the doctrine of primary jurisdiction, a referral to an administrative agency, with all its attendant delays.

Judge Lasker's decision threatens to create a substantial area of disorder in the administration of the Federal Arbitration Act and constitutes precedent for the extension and encroachment of a judicial procedural doctrine into an area that has already been preempted by Congress in 9 U.S.C. Section 4.

Further, as shown elsewhere in this petition, since no appeal will lie from the interlocutory stay order, and any appeal at a subsequent time will be rendered moot, it seems that the Appellate courts will never be able to review, in the ordinary course of appeal, a decision of the lower court staying the proceedings and invoking the doctrine of primary jurisdiction.

Petitioner respectfully submits that the decision of the District court below presents to this Court an important

novel question and an important matter of first impression which this Court should clarify before conflicts arise in the District courts regarding procedures to be followed under 9 U.S.C. Section 4.

## IV

## THE COURT BELOW SEEKS TO INVOKE A DOCTRINE OF ADMINISTRATIVE REVIEW OF JUDICIAL DECISIONS

The doctrine of primary jurisdiction is a procedure whereby courts in appropriate cases may obtain the advice of an administrative agency prior to deciding an issue. The ultimate responsibility, of course, remains with the court. *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411.

However, the Federal courts have already spoken with respect to the issue before the Court below. The validity and enforceability of this arbitration clause in Aaacon's bill of lading has been considered by the Federal courts on many occasions on the issues raised by respondents herein. In every instance the courts have unanimously upheld the provision in question.

It has been upheld by the United States Courts of Appeals for the Second and Third Circuits in *Aaacon Auto Transport, Inc. v. Levine*, 456 F2d 1335 (2d Cir. 1971); *Aaacon Auto Transport, Inc. v. Jacobson*, 475 F2d 1394 (3d Cir. 1973); *Aaacon Auto Transport, Inc. v. Ninfo*, 490 F2d 83 (2d Cir. 1974), citing with approval *Aaacon Auto Transport, Inc. v. Teafatiller*, 334 F. Supp. 1042 (SDNY 1971); and in innumerable cases before United States District Courts throughout the country.

Whenever the Federal courts have reviewed the arbitration provision in the bill of lading in question, it has been upheld without invoking the doctrine of primary jurisdiction, without reference to the Interstate Commerce Commission and without exception. The Court below, however, has refused to decide this very same issue until it receives advice from the Interstate Commerce Commission.

Aaacon respectfully submits that the very question Judge Lasker wishes to submit to the Interstate Commerce Commission has already been decided by the courts.

In the instant case, therefore, it would seem that Judge Lasker has not only invoked the doctrine of primary jurisdiction, but has, as well, invoked a doctrine of administrative review of previous judicial decisions—certainly a most dubious procedure.

Moreover, submission of this issue to an administrative agency could result in a decision which conflicts with prior court interpretations. It is the prior court decisions which must prevail. *Cory Corp. v. Sauber,* 266 F2d 58 (CA Ill 1959) rev'd other grounds 363 U.S. 709.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to review the denial of the petition for a writ of mandamus.

Respectfully submitted,

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